IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

THE RIGHT HON. SIDNEY ARTHUR TALBOT DE ROS, 22nd BARON DE ROS,

Appellant,

vs.

MARY SPENCER WEBB ET AL.

Appellees.

No. 62.

THE RIGHT HON. SIDNEY ARTHUR TALBOT DE ROS, 22nd BARON DE ROS,

Appellant,

vs.

EMELINE GELVILLE

&

AMERICAN SECURITY AND TRUST COMPANY.

Appellees.

Brief for Appellees, Mary Spencer Webb, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford D. Harrison, Lydia Caroline Harrison, Eleanor Swanson Willis, Robert Lehigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer and Emily H. Hayden.

HENRY RANDALL WEBB,
JOHN SIDNEY WEBB,
Counsel for Appellees.

LAW REPORTER PRINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 57.

THE HOME FOR INCURABLES

vs.

MARY SPENCER NOBLE ET AL.

No. 61.

EMELINE COLVILLE

vs.

AMERICAN SECURITY AND TRUST COMPANY.

Brief for Appellees, Mary Spencer Noble, Pattie Belle Tilghman, Jonathan Perry Harrison, Jr., Samuel Alexander Harrison, Lucy Bird Harrison, Bradford O. Harrison, Lydia Caroline Harrison, Eleanor Susanna Willis, Robert Leigh Spencer, Webster Lindsley Spencer, Katharine C. Spencer and Emily H. Hayden.

STATEMENT.

This suit is brought for the purpose of construing the will and codicil thereto of Mary E. Ruth, executed on the first day of June, 1892.

The will (R. 7, 8, 9) bequeaths all of the estate to the

American Security and Trust Company of this city upon the following trusts:

1. To invest and reinvest in certain securities, and pay over to the guardian or guardians of her granddaughter Sophia so much of the annual income as may be sufficient for her maintenance, education and support *until she becomes of the full age of twenty-one years*, after which period the *entire annual income* shall be paid over to the granddaughter for her sole use and benefit for and *during her natural life.*

There is a proviso by which the granddaughter is to forfeit this income at any time by expending any part of it on her father.

In case of the forfeiture above set forth, or the death of the grandchild, the entire estate is to go to two hospitals for certain specified purposes—five thousand dollars to the "Hospital of the University of Pennsylvania," and the residue to the "Home for Incurables" at Fordham, N. Y.

The will further appoints guardians for the granddaughter and an executor of the estate.

On the same day the testatrix made and executed the following codicil to her will:

> "I, Mary Eleanor Ruth . . . do make and publish this codicil to my last will and testament. I hereby *revoke* and *annul* the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, now living in New York City, said bequest being on account of her kindness to my son and myself during his and my illness and my distress." R. 9.

Fifteen days afterwards the testatrix died, and on or about the 4th day of April, 1895, not quite three years afterwards, her granddaughter, Sophia Yuengling Huston, died unmarried before attaining the age of twenty-one. R. 5.

The American Security and Trust Company filed a bill

(R. 2, 3, 4, 5, 6) alleging that it was unable to distribute the estate owing to "ambiguity and inconsistency apparent upon the face of said will and codicil," and praying relief through the direction of the court.

The appellant, The Home for Incurables (R. 14), answered—

> "that the residuary devise to it is not revoked, or if revoked at all, only to the extent of the five thousand dollars ($5,000) mentioned in said codicil."

The appellant, Emeline Colville (R. 16), answered that she—

> "is entitled to all of said estate remaining after the payment of the legacy of $5,000 thereby given to the Hospital of the University of Pennsyvania."

The appellees, who are the heirs-at-law of the testatrix, and her granddaughter, Sophia Yuengling Huston, answered, that the legacy to the Home for Incurables was revoked, and that, therefore, the estate should be distributed to the heirs, subject only to two legacies of $5,000 each to Emeline Colville and to the Hospital of the University of Pennsylvania. R. 25.

The cause came on to be heard on bill and answers before Mr. Justice Cox, who, by his decision (R. 29), sustained the entire claim of The Home for Incurables, and in addition, took away the legacy of the Hospital of the University of Pennsylvania and gave it to Emeline Colville, entirely cutting out the heirs.

The instrument under consideration, as it passed from the hands of the testatrix duly witnessed, published, and declared, read:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville," etc.

The instrument as it passed from the hands of Mr. Justice Cox, read:

> "I hereby revoke and annul the bequest therein *Hospital of the University of Pennsylvania*, made by me to the ~~Home for Incurables at Fordham, New York City, in the State of New York,~~ and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables~~) to my friend Emeline Colville, etc."

The Court of Appeals reversed the decree of the special equity term of the Supreme Court of the District of Columbia, holding (R. 44):

> "That it is the true legal intent and meaning of the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codicil; that the bequest of the rest and residue to the Home for Incurables at Fordham, in the city of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars, and that the remainder of the estate is distributable to the next of kin in accordance with the provisions of the statute of distributions."

This decision of the Court of Appeals is assigned as error by the appellants.

ARGUMENT.

Reading the will without the codicil, it appears at first blush to be a complete disposition of the testratrix's estate

and a minute and carefully guarded document, and the wonder is why she, *on the same day* should have added the codicil, which we shall proceed to show altered very materially the trend of her bequests.

The duty and power of a court in such a case is obvious; and where ambiguity is shown on the face of a paper, which is submitted to it without other evidence, for construction, the power is not to *change the face of the paper* and decide what the testator might, could or should have done, but what *he did do*; not what he may have meant to devise but what he did devise.

The will gives to the nearest living relative of the testratrix, her only descendant, a young girl with all the possibilities of a long life before her, a *life estate only*. At her death, unless the forfeiture set forth should bring about the same result sooner, the Ruth estate is to be distributed to two hospitals, away from any great-grandchildren of the testratrix who may be in existence at the death of their mother, Sophia.

Moreover, there being no evidence in the case of any kind to show, one way or another, the presumption will be that the granddaughter had the average of life in expectation. Her untimely end only three years after the will was executed can, therefore, not be considered in construing the *intentions of the testratrix*.

But we apprehend that this fact—the death of the granddaughter, unmarried, under the age of twenty-one—is relied upon by the appellants; for the argument has been resorted to that some of the appellees represented the collateral heirs of the half blood and full blood, and the will clearly intended to cut them off. *Undoubtedly the will intended to cut off, also, the great-grandchildren*, and the fact that that possibility of issue was shut out by the death of Sophia does not, and can not, affect a construction of the will and codicil.

The effect of the codicil, setting aside for the moment any

alleged ambiguity, was to strike out the devise of any residue and vest the greater part of the estate in any issue of Sophia Yuengling Huston, subject to the life estate in their mother and their surviving her.

That testatrix might have effected this result in other ways, having due regard to the limitation, "a life and lives in being and twenty-one years thereafter," is not before the court; that this codicil did effect this most obvious, natural and praiseworthy desire on the part of the testatrix is clear beyond a doubt.

Were the children of Sophia Yuengling Huston before the court asking a construction of this will and codicil, and were the question one between the great-grandchildren of Mary E. Ruth and these two charities, the court would see clearly that the *intention* of the testatrix was to undo, by means of the codicil, the wrong unintentionally done her great-grandchildren by the will.

This interpretation of the codicil is the plainest in intent and gives full force and effect to the distinct revocation of the bequest to "The Home for Incurables" which, in any event, must have been postponed until the death of the granddaughter, and in the natural course of events might not have happened for half a century.

That the intention of the testatrix as regards Mrs. Colville was to give her five thousand dollars and five thousand dollars only, we submit, that there can be no doubt; although, in her answer she sets up the claim that it was the entire bequest to the Home for Incurables that the testatrix intended to transfer to her friend "on account of her kindness to my son and myself during his and my illness, and my distress."

If the revocation of the bequest to the "Home for Incurables" is held effective, and no stronger words can be suggested as recognized in law for the purpose of working a revocation, the bequest to Mrs. Colville was five thousand dollars only and is so nominated in the bond; whatever

testatrix may have meant to do for her and from whatever source to be derived, if one thing is certain, it is that the amount was fixed at five thousand dollars.

The ruling of the Court of Appeals was correct, because it is in conformity with the general rule that a will and codicil are to be construed together as one instrument, and are to be reconciled as far as possible, though of course if irreconcilable, the codicil, as the last indication of the testator's mind, must prevail.

Lee *vs.* Prindle, 12 G. & J. 288–305.
Boyle *vs.* Parker, 3 Md. Ch. 44.
Schouler on Wills, Sec. 487.
Crozier *vs.* Bray, 120 N. Y. 375.

It is therefore evident that, if any portion of the will is irreconcilable with the codicil, it must be set aside and declared inoperative, and the codicil prevail.

The codicil unequivocally and in so many words *revokes* and *annuls* the legacy given by *the will* to the Home for Incurables, and that such was the intention of the testatrix can hardly be disputed.

The careful and explicit manner in which the testatrix describes the legatee whose bequest she wishes to revoke—

> "I hereby revoke and annul the bequest therein made by me to the *Home for Incurables at Fordham, New York City, in the State of New York*"—

is in itself a complete refutation of the theory that she wished and intended to revoke the bequest to the other legatee in her will., *i. e.*, "The Hospital of the University of Pennsylvania." There is no similarity in the sound of the names, nor of the localities, nor do the titles of the legatees contain or present any of the many snares or pitfalls to memory usually found in the cases of patent ambiguity.

The contention that the testatrix intended to revoke the legacy given to the Hospital of the University of Pennsylvania, and not that of the Home for Incurables, attempts to

make for the testatrix a will contrary to her intention expressed in her will.

> "It is a fundamental principle of law, that the intention of the testator is to govern in the construction of a will, but it is the intention expressed by *the will* and *not otherwise.*"
>
> Tucker *vs.* Seaman's Aid Society, 7 Met. 188.

> "The plain and unambiguous words of the will must prevail and cannot be controlled or qualified by any conjecture or doubtful constructions growing out of the situation, circumstances or condition of the testator, his property or natural objects of his bounty."
>
> Schouler on Wills, 500, Sec. 466.

But it has been contended that the testatrix, by using the expression—

> "I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville"

in the codicil to her will, showed that her intention was to revoke the legacy given in her will to the Pennsylvania Hospital, and give it to Mrs. Colville, and not to disturb the legacy given to the Home for Incurables.

But this is orroneous:

1st. Because it is allowing a positive provision in a will to be controlled by a subsequent vague and uncertain one.

> "An express disposition in an early part of a will must not receive an exposition from a subsequent passage affording only a conjectural inference."
>
> Roach *vs.* Hayes, 8 Ves. 590.
> Barker *vs.* Lea, 3 Ves. & Bea. 117.
> Jones *vs.* Colbeck, 8 Ves. 42.
> Lord Oxford *vs.* Churchill, 3 Ves. & Bea. 67.
> Redfield on Wills, Vol. 1, Ch. 9, 434.

"A clear gift cannot be cut down by any subsequent words unless they show an equally clear intention."

Whelan's Est., 175 Pa. St. 25.
Kiver *vs.* Oldfield, 4 De G. & J. 30.
Sheetz' Appeal, 82 Pa. St. 213.

This rule of law is undoubted, and it seems that the reverse should also be true, that a legacy which has been clearly and unmistakably revoked and annulled should need the clearest and most unmistakable language to revive it.

2d. It is allowing surmise and conjecture to overrule and set aside the clearly expressed wishes and intentions of the testatrix.

"When a clause is in itself intelligible and expressed in apt words, we can not speculate on the motives which might have governed the testator or conjecture that he has failed to express his intention and thus supply it."

Towle *vs.* Delano, 144 Mass. 95.

"Legacies by implication are not supported unless the testator's intention is clear, so that no other reasonable inference can be made."

Grout *vs.* Hapgood, 13 Pick. 164.
Doe *vs.* Sheppard, 1 Doug. 79.
Graham *vs.* Graham, 23 W. Va. 40.
Bradford *vs.* Matthews, 9 Ct. App. 438.

Courts are not permitted to give effect to the will of the testator contrary to the plain and obvious terms used by him upon mere conjecture as to his intention.

Pickering *vs.* Langdon, 22 Me. 429.
Bender *vs.* Dietrick, 7 W. & S. 287.
Hitckcock *vs.* Hitchcock, 35 Pa. St. 397.
Bane *vs.* Wick, 19 Ohio, 333.

Lord Mansfield says:

> "A court may construe a will and from what is expressed necessarily imply an intent not particularly specified in words, but we can not from arbitrary conjecture, though founded upon the highest degree of probability, add to a will or supply omissions."

3 Burr, 1634.
Schouler on Wills, Sec. 466.
Miller *vs.* Travers, 8 Bingh., 244.

3d. This ruling can not be sustained upon the ground of mistake:

The principle of law is well settled to the contrary—

> "Because the testator has made a mistake, you can not afterwards remodel the will, make it what you supposed he would have drawn it, if he had known the incorrectness of his supposition."

Box *vs.* Barrett, Law Rep., 3 Eq. 244.
Holmes *vs.* Constance, 12 Ves. Jr. 279.
Hayes Ex'r. *vs.* Hayes, 21 N. J. Eq. 265.

> "The rule is that wherever there is a clear mistake or a clear omission, recourse is had to the general scope of the will and the general intention to be collected from it; but the first thing to be proved is, that *there is a mistake.*"

Mellish *vs.* Mellish, 4 Ves. 50.
1 Story Eq. Jur. Sec. 180.
Smith *vs.* Maitland, 1 Ves. Jr. 362.
Given *vs.* Hilton, 95 U. S. 594–5.

The court can only find that a mistake has been made from the paper itself, and must not resort to conjecture to change the paper, unless by such change all of the intentions of the testatrix are made clear. The change herein contended for *reads out of the will an unmistakable revocation*

and deliberately robs a legatee of a bequest, not revoked in terms or by necessary implication.

A will can not be corrected by evidence of mistake, so as to strike out the name of the legatee and insert that of another.

Yates *vs.* Cole, 1 Jones Eq. 110.
Fitzpatrick *vs.* Fitzpatrick, 36 Iowa, 674.

"All doubts are to be resolved in favor of the testator's having said exactly what he meant."

Cody *vs.* Bunn, 46 N. J. Eq. 133.

"Plain clear words, read in their ordinary meaning, must always govern in searching for the intention of a testator, unless repugnant to other words equally plain and clear, used in another part of the same will."

Courter *vs.* Stagg, 27 N. J. Eq. 307.

Lord Kenyon, in Lane *vs.* Stanhope, 6 T. R. 352, said:

"It is our duty in construing a will to give effect to the devisor's intention so far as we can consistently with the rules of law; not conjecturing, but expounding this from the words used."

Taylor *vs.* Taylor, 47 Md. 299.

Applying this rule to the will and codicil in question, the one thing which appears most prominent in the mind of the testatrix is her desire to revoke and annul the bequest made to the Home for Incurables. This bequest was not for a specific amount, but was for "all the rest and remainder" of her estate, and was the one which she most probably would revoke. The language used by her is clear and decisive, and can leave no doubt in the mind of anyone as to her intention.

The uncertainty arises from the use of the word "the" before the words "five thousand dollars" in the codicil. No

uncertainty would have arisen had that word been left out and the codicil read as follows:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville."

While this word "the" being where it is in the codicil may raise a question as to whether the testatrix thought she had given the Home for Incurables a legacy of five thousand dollars in her will, or whether she thought she was revoking the legacy of five thousand dollars given to the Pennsylvania Hospital, can in no way affect the revocation of the legacy to the Home for Incurables. That is clearly and pointedly annulled and revoked. No language can be clearer than that which is used in the codicil.

Whether this was done by mistake or not can not be considered. The will and codicil must be construed according to the language used and not according to what language might or should have been used, nor on account of any conjecture as to the intention of the testatrix.

Nor can the word "the" before the words "five thousand dollars" be taken to mean that the testatrix intended to or did give to Emeline Colville the rest and remainder of her estate, or, rather, the same bequest which she had given in her will to the Home for Incurables.

The testatrix' intention, as expressed in the codicil, clearly and unmistakably was to give Emeline Colville the sum of $5,000. Emeline Colville's legacy is expressly limited to $5,000, and she can get no more. The intention of the testatrix is clearly defined in this particular, and can not be changed by mere conjecture.

In Mann *vs.* Executors of Mann, 14 Johns. 9, it was held:

> "That where there is a specific sum named, the extent of the testator's bounty is defined and his will

known; and it is the duty of courts to search for a construction that will carry it into effect."

The appellant, the Home for Incurables, contends that the ruling of Judge Cox was right, but to sustain this contention it must appear that it is the only reasonable presumption under the existing circumstances.

This is not so. It is much more reasonable to presume that the testatrix thought she had given the Home for Incurables a legacy of five thousand dollars in her will, which she wished to revoke by the codicil and give to her friend.

Again, blood being thicker than water, it is, if anything, still more reasonable to presume that she wished her granddaughter's children to have the bulk of her property after her (the granddaughter's) death, and made the codicil accordingly.

The only question of any doubt seems to be whether the testatrix did not intend to also revoke the legacy, given in her will, to the Pennsylvania Hospital.

This is highly probable, for it appears that between the time of the execution of the will and that of the codicil, the testatrix experienced an entire change of heart, and decided to accede to the claims of affection and friendship rather than to those of charity, and to endow the living rather than erect monuments to the dead.

The contention of the appellant, the Home for Incurables, is expressed in the decree rendered by the Special Equity Term of the Supreme Court of the District of Columbia (R. 24), which was reversed by the Court of Appeals. R. 44.

The decree is as follows:

> "It is by the court. this 25th day of June, A. D. 1896, ordered, adjudged, and decreed, that the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to *revoke* the legacy of five thousand dollars given in and by said will to the Hospital of the University

> of Pennsylvania, and to substitute Mrs. Emeline Colville as the legatee of said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, *but not to revoke the residuary bequest in said will contained in favor of the "Home for Incurables, at Fordham, in New York City."*

To support this ruling the court has to shut its eyes to the natural claims of the testatrix's own great-grandchildren; and to substitute "Hospital of the University of Pennsylvania" in place of "Home for Incurables at Fordham, New York City, in the State of New York," and again in the parenthesis to substitute for "said Home for Incurables," the words "said Hospital of the University of Pennsylvania."

In other words, the court, without any evidence of her intent other than the instrument itself, must take pen in hand and rewrite the codicil thus:

> "I hereby revoke and annul the bequest therein *Hospital of the University of Pennsylvania,* made by me to the ~~Home for Incurables at Fordham, New York City, in the State of New York,~~ and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables~~) to my friend Emeline Colville, etc."

To state such a case is to show the error of the decree.

The only ambiguity or uncertainty in the codicil arises from the second part or clause, written in parenthesis, to which Mr. Justice Morris, in the opinion of the court, refers as follows (Rec., 43):

> "We give effect to each and every provision of the codicil and to the will as an entirety by rejecting as

> *surplusage* the *erroneous recital* in the second clause of the codicil, which is no more than a recital and not essential to the integrity of the instrument as a testamentary disposition."

But, if we grant that this clause was a mistake and contrary to the intention of the testatrix, in accordance with the contention of the Home for Incurables, it does not affect the revocation of its legacy, unless we also make the additional and wholly unwarranted change in the first clause.

To read the codicil thus:

> "I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed *Hospital of the University of Pennsylvania* to said ~~Home for Incurables)~~ to my friend Emeline Colville, etc."

would only raise the question as to the intention of the testatrix in regard to the legacy of the Hospital of the University of Pennsylvania, and in no way affect the revocation of the legacy of the Home for Incurables.

The uncertainty does not arise as to which legacy is revoked, but only as to what five thousand dollars the testatrix intended to give Emeline Colville.

To grant the contention of the appellant, the Home for Incurables, and hold that the legacy of the Home for Incurables was not revoked by the codicil, the court must decide against the clear and explicit language of the codicil, and so decide relying upon a vague and uncertain subsequent expression which is in no way connected with said revocation but which can be omitted without impairing the sense of the codicil. It must in addition take away from another legatee a legacy, which was plainly *not revoked*, and further take from the heirs their inheritance, which was theirs by

law and of which they can not be deprived except by specific words to that effect or by implication too strong to be withstood.

Such action on the part of the court would be contrary to the words of the codicil, contrary to the intention of the testatrix as expressed therein, and in defiance of the rules of law and justice.

It would be in fact rewriting the will of the testatrix.

> "Interpreters have to deal with the written expressions of the writer's intention and courts of law to carry into effect what has been written, not what it may be surmised, on however plausible grounds, that he intended only to have written."
>
> Jackson *vs.* Alsop, 67 Conn., 253.
> Pack *vs.* Shanklin, 27 S. E., 389.
> Kimball *vs.* Story, 108 Mass., 385.

The Chief Justice of the Court of Appeals, who delivered an opinion dissenting from that of the court, was mistaken in his statement when he said (Record, 45) "that it is conceded upon all sides." First. That it was not the intention of Mrs. Ruth to die intestate as to any portion of her estate. Second. That a mistake was made by the draftsman of the codicil.

The cause being heard on bill and answers and the answers of the heirs containing no such concession from them, we are at a loss to understand how the Chief Justice could have gotten anything to base his erroneous position on.

In the argument we maintained and still do maintain that when a written, witnessed, and executed document is before the court the only thing to be done is to interpret it as it is, not as it might, could, or should have been.

No evidence was taken to enlighten the court on the relations of the testatrix with any of the legatees, and all that was known was in the will and codicil, and so far as that goes it is all that there is to be known of the intentions of the testatrix. How can any court say that she meant to do

other than she did. And even, if her intention had been to do this or that, would not the only question for a court to decide still be: Had she *in fact* done so?

It matters very little now what she intended to do or if the draftsman made a mistake, for the paper before us is offered in evidence duly authenticated as the law requires, and must be the only basis of any judgment.

Patch *vs.* White, 117 U. S., 210.

We contend that after providing for her grandchild for life, Mrs. Ruth thought it best to allow the remainder of her estate, with the exception of the legacy of $5,000 given to her friend Mrs. Colville, to go to the issue of that grandchild. She was then a young girl who had every hope of a long life before her, and it could reasonably have been expected that she would leave children of her own upon her death. Mrs. Ruth most probably did not care to look so far into the future and was content, after providing for the interest of her grandchild, to let the law guard the interests of her great grandchildren. It certainly can not be reasonably supposed that she intended to deprive the issue of her grandchild of all benefits of her estate and possibly force them to become objects of charity.

This last proposition, absurd as it is, forms the principal foundation and is absolutely essential to the claims of both appellants—the Home for Incurables and Emeline Colville.

The appellants and the justice dissenting seem to overlook the intervening life estate of this young girl and the strong possibility at the time of the making of the will of her leaving issue and seek to construe the will exactly as if the testatrix had devised her property directly to the parties to this controversy.

We have always contended that there was no mistake made in the codicil by the draftsman, but that Mrs. Ruth dictated the words of the codicil as they were written, fully intending to revoke the legacy of the Home for Incurables.

The claims of this appellant are based largely upon the arguments in the dissenting opinion:

1. That it can not be supposed that the testatrix intended to destroy the whole scheme of her will by the codicil, and consequently she intended to revoke the legacy, which corresponded in amount to the legacy given to Emeline Colville.

This is best answered by the opinion of the court. R., 44.

Justice Morris says:

> "It would be difficult, in any view that we might take of this case, to find any controlling purpose or guiding intention on the part of the testatrix, inasmuch as the fact that before the ink was dry with which her original will was written, she radically changed her mind in regard to the disposition of her property, is sufficient to raise a doubt whether she had in fact any well-defined purpose in regard to such disposition; and, were we to indulge in conjecture, we would feel no assurance in any conjecture that we might adopt, that we had found the true intent and purpose of the testatrix. We deem it most proper, therefore, to indulge in no conjecture; to take the words of the will and the codicil as they stand, and only to reject as unnecessary one phrase, which is, in fact, unnecessary to the integrity of the will and codicil.
>
> "In arriving at the intention of the testator, so much as is false in the description of the premises devised may be stricken out, and if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom."

Hoffman *vs.* Young, 170 Ill. 297.
Whitcomb *vs.* Rodman, 156 Ill. 126.

2. Much stress is laid upon the use of the word "bequest" (R. 45, 46) in the codicil, and the argument is advanced that it was a "bequest," and only a "bequest," that was to be revoked. The only "bequest" given by the will was

given to the Hospital of the University of Pennsylvania, and hence it is argued that its legacy was revoked, and not that of the Home of Incurables.

But this argument is very forced and strained, and if adopted would make the technical name of the gift govern in the construction of wills, and be contrary to the fundamental principle of the law, that the name of the legatee must govern, and not the description of the legacy.

Gillet *vs.* Gane, L. R. 10, Eq. 29.
Burnasconi *vs.* Atkinson, 10 Hare, 345.
Adams *vs.* Jones, 9 Hare, 485.

> "Whether the word 'Bequeath' means the same as 'Devise' when used in a will is to be determined by the connection in which it is found."
>
> Dow *vs.* Dow, 36 Me. 211–216.
> Laing *vs.* Barbour, 119 Mass. 525.
> Lasher *vs.* Lasher, 13 Barb. 109.
> Ladd *vs.* Harvey, 21 N. H. 528.
> O'Toole *vs.* Brown, 3 El. & Bl. 584; 77 E. & L. 584.

It is possible that Mrs. Ruth may have supposed that she had given the Home for Incurables a legacy of $5,000 by her will, which legacy she wished to revoke and give to her friend, Emeline Colville, and for this reason she used the language she did in the codicil.

But this conjecture, reasonable as it is, does not invalidate the revocation of the legacy to tl e Home for Incurables or give Emiline Colville more than $5,000.

It does not deprive the heirs of their inheritance, because the instant the devise to the Home for Incurables was revoked, it became the heirs' by descent, and they can not be deprived of it by mere conjecture.

The general rule, that no one is presumed to make a will without meaning to dispose of all his estate by said will, must yield when such construction can not be implied from the words of the will.

"As a general rule, the court will struggle against an intestacy, but in a case where a share is given by the will and revoked by a codicil without any words of gift to any other person the court must hold that it is undisposed of, and, as to such share, that there is an intestacy."

Ramsay *vs.* Schelmerdine, Law Rep., 1 Eq., 129–134.

But against this general rule another and equally fundamental rule in the construction of wills must be recognized here, viz:

"The heirs-at-law shall not be disinherited by conjecture, but only by express words or necessary implication."

Justice Story says:

"It is not sufficient that the court may entertain a private belief that the testator intended a fee, it must see that he expressed that intention with reasonable certainty on the face of his will. *For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy;* and though the testator *may disinherit him,* yet the law will execute that intention only when it is put in *a clear and unambiguous shape.*"

Wright *vs.* Page, 10 Wheat. 228.
Allen's Exrs. *vs.* Allen, 18 How. 392.
Bradford *vs.* Bradford, 6 Wharton, 244.
Bradford *vs.* Matthews, 9 Ct. App. 443.
Schouler on Wills, Sec. 479.
Ridgely *vs.* Bond, 18 Md. 448.
Wilkinson *vs.* Adam, 1 Ves. & Bea. 466.

Bowie C. J., in Ridgely *vs.* Bond, says:

"In cases of this kind the implication must be plain, and not merely a possible or probable one; *for, the title of the heir-at-law being clear and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification.*"

And in Wilkinson *vs.* Adams, Lord Eldon has said:

> "With regard to that expression, 'necessary implication,' I will repeat what I have before stated, from a note of *Lord Hardwicke's* judgment in Coriton *vs.* Hellier, that in construing a will *conjecture must not be taken for implication*; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator can not be supposed."

In Brant *vs.* Wilson, 8 Cow. 57, Woodworth, J., says:

> "If the codicil had expressly revoked the devise in the will, then the right of the heir-at-law would be clear."

Hitchcock *vs.* Hitchcock, 35 Pa. St. 397.
Howard *vs.* Peace Society, 49 Me. 288.

But it is a maxim that a testator can disinherit his heirs or next of kin only by leaving his property to others; which has not been done in this will, however plain the intention to that effect may be considered.

Lord Mansfield said, in Deemer *vs.*Gaskin, Comp. 657:

> "Though the intention to disinherit the heir be ever so apparent, he must, of course, inherit unless the estate is given to somebody else; and the reason is that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently."

See Coffman *vs.* Heatnole, 2 L. R. A. 848.
Zimmerman *vs.* Hafer, 81 Md., 347; 23 Wash. Law Rep., 567.
Fitch *vs.* Weber, 6 Hare, 145.
Crane *vs.* Doty, 1 Ohio, 284.

We, therefore, respectfully submit that the decision of the Court of Appeals should be affirmed.

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